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No. 94-9

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Cross-Petitioners,

v.

C.I. STROUD, J.M. SMITH, and ALFRED E. MORRIS, Individually,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS-RESPONDENTS BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. CAN DELIBERATE INDIFFERENCE BE SHOWN BY INFERENCES OR BY CONTENDING AN ALTERNATIVE METHOD OF INVESTIGATION BY A SUPERVISOR INTO A TROOPER'S ALLEGED USE OF EXCESSIVE FORCE WOULD HAVE BEEN MORE APPROPRIATE?

II. WOULD A REASONABLE SUPERVISOR, IN LIGHT OF CLEARLY ESTABLISHED LEGAL RULES, BELIEVE FOLLOWING STANDARD OPERATING PROCEDURES, MAKING RECORDS OF INFORMAL COMPLAINTS, MONITORING A TROOPER'S ACTIONS, AND REPORTING UP THE CHAIN OF COMMAND WAS LAWFUL SUPERVISION?

III. SHOULD THIS COURT EXTEND THE PROTECTIONS OF SUBSTANTIVE DUE PROCESS TO CLAIMS BASED ON GOVERNMENTAL ACTION WHICH INCIDENTLY AFFECTS THE FAMILY RELATIONSHIP WHEN THE ISSUE IS MOOT IN THIS CASE?

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The plaintiffs have filed a cross-petition seeking review of the lower court's decision granting summary judgment to First Sergeant J.M. Smith both on the merits and

based on qualified immunity from liability. A second basis of the cross-petition is the granting of summary judgment for all defendants on a substantive due process claim.

The procedural history of this matter is set forth in the petition for writ of certiorari. The representations of the cross-petitioners as to the facts relating to First Sergeant Smith are misleading as there were additional uncontested facts which have a bearing on the questions presented in the cross- petition.

Trooper Alfred E. Morris joined the North Carolina State Highway Patrol in 1983 and, after completing a four and one-half month basic school, was assigned to Columbus County. (J.A. 161,162). In December, 1988, First Sergeant J.M. Smith was assigned to that county as a second line supervisor. (J.A. 213). The death of Sidney Bowen, which gave rise to this action, occurred in February, 1990. (J.A. 279,280).

Trooper Morris was frequently assigned to work nights and weekends in an area known to have individuals with a propensity to flee and forcefully resist arrest. It is considered one of the worst areas to patrol in the State. (J.A. 210, 211).

Chief District Court Judge William C. Gore, Jr. presided over many trials where Trooper Morris had initiated the charges, and found him to be a hard worker and a dedicated Trooper. (J.A. 251). During May, 1989, several lawyers had spoken to Judge Gore about the amount of force Trooper Morris used against their clients. Without

investigating those allegations, Judge Gore thought the Patrol should be aware of what the defense lawyers were discussing. (J.A. 252). Sergeant White, who was a subordinate of First Sergeant Smith, had spoken to Judge Gore and summarized the meeting on paper for First Sergeant Smith. (J.A. 239,240).

Judge Gore did not wish to file a complaint pursuant to Patrol policy against Trooper Morris, nor did he have any personal knowledge of particular cases the attorneys were discussing. The judge did mention that a defense attorney, Dennis Worley, had spoken to him about an upcoming case with his client, Christopher Hardee. (J.A. 240).

First Sergeant Smith discussed the matter with Sergeant White and Trooper Morris. He sent Sergeant White to monitor the trial of Christopher Hardee. (J.A. 228). First Sergeant Smith discussed the matter with Troop Commander Captain C.V. Parks, and they agreed to monitor Trooper Morris, but in their opinion, it had more to do with the area patrolled than with Trooper Morris. (J.A. 222).

Christopher Hardee was convicted by Judge Gore of driving while impaired and resisting arrest, and Sergeant White found there to be no factual basis to an alleged use of excessive force. (J.A. 241). This was reported back to First Sergeant Smith. On two occasions, First Sergeant Smith rode with Trooper Morris to observe his conduct and saw no need for concern. (J.A. 232).

REASONS FOR DENYING WRIT

The cross-petitioners contend the case against First Sergeant Smith should be reviewed because he was named in the original complaint with the petitioner, First Sergeant Stroud.

The cross-respondents contend the cross-petitioners have failed to allege any proper basis for their petition to be granted as the decision by the lower court complies with the law. The petitioner, First Sergeant Stroud, seeks review of a narrow question of law relating to supervisory liability for a former subordinate's subsequent conduct. The cross-petitioners seek review of summary judgment granted and affirmed below against First Sergeant Smith simply because they were unsuccessful, and neither the facts nor the issue of the cross-petition are related to the question presented in the original petition.

The cross-petitioners also seek review of the granting of summary judgment on their substantive due process claim. Three circuit courts have recognized such a claim, but this issue is moot as the cross-respondents have qualified immunity from liability even if this Court recognizes such a claim.

I. THE CROSS-PETITIONERS HAVE FAILED TO PRESENT A FACTUAL BASIS TO SUPPORT THEIR CLAIM THAT FIRST SERGEANT SMITH WAS LIABLE FOR UNLAWFUL SUPERVISION UNDER 42 U.S.C. § 1983, AND ALTERNATIVE METHODS OF INVESTIGATION INTO A TROOPER'S CONDUCT DO NOT ESTABLISH SUPERVISORY LIABILITY.

The lower court held three elements are necessary to establish liability of supervisors for the alleged constitutional injuries inflicted by their subordinates under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices, and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud,* 13 F.3d 791, 799 (4th Cir. 1994).

Without addressing whether the cross-petitioners' evidence was sufficient to support all of the elements, the lower court found insufficient evidence to support the second element, deliberate indifference or tacit authorization, on the part of First Sergeant Smith and granted summary judgment. *See Shaw* at 801.

When the need for action is known or is so obvious and the inadequacy of action so likely to result in a violation of constitutional rights, a supervisor can be said to be deliberately indifferent to the need. *Farmer v. Brennan,* 62 U.S.L.W. 4446, 4450 (U.S. June 6, 1994), citing *City of Canton*, 489 U.S. 378, 390, n. 10 (1989) (Failure to train officers concering constitutional limitations on the use of deadly force would be deliberately indifferent.) Even when the need for action is known, a supervisor may be free from liability if he responded reasonably to the risk, even if the harm was not averted. *Farmer* at 4451.

The cross-petitioners assume a heavy burden of proof in establishing deliberate indifference. A supervisor's continued inaction in the face of widespread abuses provides a basis for liability. *Slaken v. Porter*, 737 F.2d 368, 372-73 (4th Cir. 1984). The evidence proffered by the cross-petitioners, even under summary judgment standards, was insufficient to show liability. The cross-petitioners cannot simply rest upon mere allegations and inferences. Instead, the non-moving party must adduce specific provable facts which establish that there is a triable issue. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

There is no dispute as to what allegations First Sergeant Smith was aware of concerning Trooper Morris' use of force. The comments of local defense attorneys concerning Trooper Morris' use of force on arrestees was relayed by Judge Gore and eventually to First Sergeant

Smith. Only one individual, Christopher Hardee, and his attorney, Dennis Worley, were named. Neither Judge Gore nor the attorney wished to file complaints with the Patrol, which would have led to a full investigation by the Internal Affairs Section. (J.A. 252, 256). Rudolph Towns was alleged to have suffered a fractured skull during his arrest by Trooper Morris, but never conveyed any complaints to First Sergeant Smith. (J.A. 215, 318).

Nor is there any dispute that First Sergeant Smith took action. First Sergeant Smith discussed Dennis Worley's concerns with Sergeant White who supervised Trooper Morris directly. They monitored the Christopher Hardee case. First Sergeant Smith discussed the matter with his Troop Commander, and it was agreed that Trooper Morris' conduct would be monitored. First Sergeant Smith also rode with Trooper Morris on at least two occasions to observe his conduct. (J.A. 232). This action does not show deliberate indifference or tacit authorization. The facts underlying this case do not warrant review by this Court.

The lower court recognized that although a separate element, in practical terms, a showing of a pervasive and unreasonable risk of harm is also a necessary component of establishing gross indifference. *Shaw* at 799, n. 12. The cross-petitioners failed to present such evidence.

No complaints against Trooper Morris for improper use of force were filed with Internal Affairs during First Sergeant Smith's fifteen months of supervision. The fact that some local criminal defense attorneys discussed concern

about a Trooper's conduct does not lead to the conclusion that constitutional violations have occurred.[1] Christopher Hardee was found guilty by Judge Gore of resisting Trooper Morris, and Sergeant White reported that there was no evidence of improper conduct. (J.A. 306, 241-242). Rudolph Towns made horrific allegations of a fractured skull and permanent injury which are a complete fiction and reiterate the need to distinguish between mere allegations and provable facts.[2] Indeed, the number of complaints bears no relation to their validity. *Brooks v. Scheib,* 813 F.2d 1191, 1193 (11th Cir. 1987) (Officer patrolled high crime area arresting repeat offenders who frequently use citizen complaints to harass officer.)

Furthermore, the number of charges brought by Trooper Morris do not indicate a pervasive and unreasonable risk of harm. This Court has emphasized the danger in relying on numbers alone without the numbers in context. *See Rizzo v. Goode*, 423 U.S. 362, 374-75 (1976). During the time of First Sergeant Smith's supervision, Trooper

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[1] According to First Sergeant Smith, it is not unusual for attorneys to attempt to draw attention away from their client's conduct by claiming police misconduct and perhaps obtaining a favorable plea bargain. (J.A. 228).

[2] Rudolph Towns' complaint against Trooper Morris was dismissed and Rule 11 sanctions imposed because medical evidence did not remotely support the allegations. *Towns v. Morris*, No. 92-7-CIV-7-F (E.D.N.C. Feb. 5, 1993), *appeal pending*, No. 93-1295 (4th Cir. Feb. 26, 1993).

Morris had 3,255 enforcement contacts which led to 1,022 violations, 171 for driving while impaired, 11 for resisting, delaying, or obstructing an officer, and 2 for assault on a law enforcement officer. (J.A. 279-80). Gross indifference to an alleged use of excessive force is not demonstrated by the number of charges issued by Trooper Morris as the cross-petitioners allege. There is no showing of a pervasive and unreasonable risk of harm by issuing assault charges against two of the over 3,000 people with whom Trooper Morris had enforcement contact.

Finally, the cross-petitioners contend First Sergeant Smith should have ignored the statements of Judge Gore and Dennis Worley and requested an Internal Affairs investigation or questioned the thousands of people with whom Trooper Morris had enforcement contact, or consult hospital records. The cross-petitioners cite no authority to support their contention, as indeed there is none. It is inappropriate to conclude injury could have been avoided if supervisors had done more, as such a claim could be made in every case. *See Canton*, 484 U.S. at 391. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (Reasonableness must be judged from the perspective of a reasonable officer at the scene under the totality of the circumstances rather than with the 20/20 vision of hindsight.) *Morrison v. Martin,* 755 F. Supp. 683 (E.D.N.C. 1990) (Fact that less force could have been used is immaterial.) *Belew v. Ruppert,* 694 F. Supp. 1214, 1215 (D. Md. 1988) (The fact some other action by deputy might now seem preferable is immaterial.)

The lower court determined as a matter of law the cross-petitioners failed to present sufficient evidence that First Sergeant Smith was grossly indifferent to alleged constitutional violations. The lower court did not make factual determinations as the cross-petitioners contend, but rather addressed the insufficiency of facts presented. Summary judgment on the merits was properly granted.

II. A REASONABLE OFFICER, IN LIGHT OF CLEARLY ESTABLISHED LEGAL RULES, COULD BELIEVE THE ACTION TAKEN BY FIRST SERGEANT SMITH WAS LAWFUL, AND HE IS ENTITLED TO QUALIFIED IMMUNITY.

The cross-petitioners contend that although First Sergeant Smith took some action to investigate Trooper Morris' conduct, he should have done more than Patrol policy requires, and is not entitled to qualified immunity from liability.

The law concerning the defense of qualified immunity from liability is well established. Government officials have qualified immunity for discretionary functions so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In determining the availability of qualified immunity, the point of reference is the time at which the action or inaction occurred. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Officers are entitled to qualified immunity when they rely on standard operating procedures, if that reliance is

reasonable. *Vizbaras v. Prieber,* 761 F.2d 1013, 1015 (4th Cir. 1985), *cert. den.* 474 U.S. 1101 (1984).

Patrol policy contains a procedure whereby a citizen can lodge a complaint and it will be forwarded to the Internal Affairs Section to determine the appropriate classification and investigation. The citizen must specify he wishes to file a complaint, although it does not have to be in writing. (J.A. 850-51).

Despite the cross-petitioners' argument to the contrary, there is no Patrol policy requiring a supervisor to file a complaint when the citizen does not wish one to be filed. Therefore, pursuant to Patrol policy, First Sergeant Smith, when informed that Judge Gore and Dennis Worley specified they did not want a complaint filed, did not file one.

Even if policy was violated, First Sergeant Smith would not lose the defense of qualified immunity. Failure to comply with a clearly established administrative policy does not deprive an official of qualified immunity which depends on objective reasonableness of conduct as measured by reference to clearly established constitutional law. *Davis v. Scherer,* 468 U.S. 183, 194 (1984).

The cross-petitioners contend that the Patrol policy "may" be unconstitutional on its face, and First Sergeant Smith is not entitled to qualified immunity for actions consistent with the policy. There is no authority to support the contention that the Patrol policy is unconstitutional nor do the cross-petitioners cite any case. If the cross-petitioners

have no authority that the Patrol complaint policy was unconstitutional, surely First Sergeant Smith was acting reasonably in complying with the policy.

The cross-petitioners have failed to establish a disputed issue of fact regarding whether First Sergeant Smith's actions with respect to investigating Trooper Morris' conduct violated any clearly established constitutional right and, therefore, summary judgment based on qualified immunity was proper. The cross-petitioners have failed to show a split in Circuits or that the lower court decision is inconsistent with any decision of this Court. This issue was correctly decided and does not warrant further review.

III. THIS CASE IS NOT APPROPRIATE TO EXTEND THE PROTECTIONS OF SUBSTANTIVE DUE PROCESS TO CLAIMS BASED ON GOVERNMENTAL ACTION WHICH INCIDENTLY AFFECTS THE FAMILY RELATIONSHIP.

This Court has consistently been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. *Regents of University of Michigan v. Ewing,* 474 U.S. 214, 225-26 (19[illegible]. Under the doctrine of judicial self restraint, this Court has exercised the utmost care when the Court is asked to break new ground in the field of substantive due process. *Collins v. Harker Heights,* 503 U.S. ___, 117 L. Ed. 2d 261 (1992) (42 U.S.C. § 1983 held not to provide remedy for municipal employee's death, because failure to train or warn about known workplace hazards, does not violate Fourteenth Amendment due process

clause.) *Albright v. Oliver,* ___ U.S. ___, 62 U.S.L.W. 4078 (1994) (Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, "that Amendment", not the more generalized notion of substantive due process, must be the guide for analyzing these claims, citing *Graham v. Connor,* 490 U.S. at 395.)

The cross-petitioners are requesting this Court extend substantive due process protection to family members of the deceased when the government action was not directed against them. Should this Court agree with the cross-petitioners, the issue would be moot as the cross-respondents have qualified immunity from liability.

There is no dispute that in 1990, the Fourth Circuit refused to allow a separate substantive due process right for family members against police officers who injured or killed a relative. *Rucker v. Harford County,* 946 F.2d 278, 282 (4th Cir. 1991), *cert. den.* 112 S. Ct. 1175 (1992). The cross-petitioners contend their Fourteenth Amendment rights were violated by the cross-respondents. They must show that right was clearly established law in 1990, or the cross-respondents are entitled to qualified immunity. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

Once a defendant pleads a defense of qualified immunity, the threshold determination is whether the law the defendant is alleged to have violated was clearly established at the time the action occurred. *Siegert v. Gilley*, 500 U.S. ___, 114 L. Ed. 2d 277 (1991).

The cross-petitioners cannot show that the cross-respondents knew or should have known their actions would violate the constitutional rights of the Bowen family. If the constitutional claim was not clearly established at the time the action was taken, an official could not be expected to anticipate subsequent legal developments. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The cross-petitioners cannot meet the threshold requirement to defeat qualified immunity and, therefore, should this Court grant certiorari and agree with the cross-petitioners, they would not be able to proceed with the claim.

This Court has long recognized there are hundreds of cases where the Circuits may disagree yet certiorari is not granted. While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution of the issue in conflict among the Circuits can await a day when the issue is posed less abstractly. *See Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959) (If the resolution of a clear conflict among the Circuits is irrelevant to the ultimate outcome of the case before the court, certiorari may be denied.)

A ruling that does not provide any relief to the prevailing party ignores the duties of federal courts to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions or to declare principles or

rules of law which cannot affect the matter in issue in the case before it." *Boston Firefighters Union, Local 718 v. Boston Chapter N.A.A.C.P., Inc.*, 468 U.S. 1206 (1989), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

Although there are three Circuits which recognize a substantive due process claim[3] when government action incidently affects the family relationship, resolution of such a conflict would have far reaching ramifications involving complex legal and factual determinations. For example: (1) Which family members are entitled to protection? (2) Does the right extend to unborn fetuses, parents, cousins, grandparents? (3) Is it limited to death or is any injury sufficient to warrant a substantive due process claim? The dynamics of the substantive due process claim have not been determined in the three courts which have recognized it. The issue raised by the cross-petitioners does not warrant review in this case.

CONCLUSION

The petition of C.I. Stroud presents a narrow legal issue concerning a federal question where the lower court's decision conflicts with applicable decisions of this Court. The cross-petitioners seek a writ of certiorari of entirely different factual and legal issues which do not warrant review

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[3] *Bell v. City of Milwaukee*, 747 F.2d 1205 (7th Cir. 1984); *Smith v. City of Fontana*, 818 F.2d 1141 (9th Cir. 1987), *cert. den.* 484 U.S. 935 (1987); *Trujillo v. Board of County Commission of City of Sante Fe*, 768 F.2d 1186 (10th Cir. 1985).

by this Court. For the reasons stated, the cross-petition for writ of certiorari should be denied.

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